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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 365

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

REPLY BRIEF FOR PETITIONER.

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(36179)

INDEX

I. Petitioner Not Estopped to Contend that McCarthy Was Not Its Agent or Employee 1

II. No Concession Below that McCarthy Was Such Agent 4

III. David Did Not Know of Petitioner's Engagement With McCarthy 9

Cases Cited

Casement vs. Brown, 148 U. S. 615 9
Chicago M. & St. P. R. Co. vs. Coogan, 271 U. S. 472 3
Driscoll vs. Towle, 181 Mass. 416 9
Fink vs. Furnace Co., 82 Mo. 276 6
Lawhon vs. St. Jos. Vet. Lab., 252 S. W. 44, 48 7
Painter vs. Mayor of Pittsburgh, 46 Pa. St. 313 7
Standard Oil Co. vs. Anderson, 212 U. S. 215 8
St. Louis-S. F. R. Co. vs. Mills, 271 U. S. 344 4
Thomassen vs. West St. L. Water & Light Co., 312 Mo. 150 7

Text Books Cited

Cooley on Torts, (2nd Ed.) p. 647 7
2 Corpus Juris, Sec. 10, p. 424 8
14 Ruling Case Law, p. 67, Sec. 3 8
2 Thompson on Negligence, Sec. 22, p. 899 6
Wharton on Negligence, Sec. 181 7
4 Words and Phrases, (3d Series) pp. 222-235 8

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I.

Petitioner is not estopped to contend here that McCarthy was not its "officer, agent or employee" within the meaning of these terms as used in the Employers Liability Act for whose knowledge and failure to act petitioner could be held responsible.

Respondent asserts that this point was not raised in the trial court. This contention is wholly without

merit. The request of petitioner, defendant below, for a directed verdict at the close of plaintiff's evidence, and the renewal of this request at the close of all the evidence, each of which requests was denied by the trial court, and exceptions duly taken, sufficiently raised the point.

It will be noted that the trial court in overruling this request at the close of all the evidence expressly held (R. 203) that McCarthy's knowledge was *imputable* to petitioner. Plaintiff's instruction No. 1, given by the court, was based squarely on McCarthy's knowledge and his failure to communicate that knowledge to petitioner. The exception to the giving of this instruction was of itself sufficient to preserve petitioner's contention, even had there been nothing more.

Respondent also asserts that the point was not raised in the Missouri Supreme Court by any assignment of error and quotes from the opinion of that court this excerpt taken from the appellant's brief:

> "The sole question presented in the trial court and pressed here is whether or not any negligence of the defendant was shown and if so whether it was the proximate cause of David's death."

The Supreme Court did not undertake to set out the various assignments of error nor the reasons assigned by the appellant for the insufficiency of the evidence nor the various reasons urged by appellant as the basis of its contention that the evidence was insufficient to show negligence, etc. That court, with-

out assigning any reason therefor, simply treated McCarthy's knowledge as that of petitioner and held petitioner liable for failure to give David warning on account of this imputed knowledge. That court necessarily ruled that McCarthy was an agent or employee of petitioner within the meaning of the Act. Otherwise, it could not have held that McCarthy's knowledge was petitioner's knowledge and could not have held that the cause was properly submitted to the jury.

The evidence being undisputed on the question of the character of McCarthy's employment as an informant, and the nature and character of the information sought to be obtained, and the circumstances under which information from him had been contracted for by petitioner, the case was then resolved into a pure question of law, whether under the Act the relation shown to have existed between petitioner and McCarthy was such as to make petitioner responsible for his uncommunicated knowledge or his failure to promptly communicate that knowledge to petitioner.

In *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, this court in dealing with the question of the sufficiency of the evidence to show liability under the Act, speaking through Mr. Justice Butler, at page 474, said:

> "The rights and obligations of the petitioner depend upon the Act and applicable principles of common law as interpreted by the Federal Courts. The employer is liable for injury or death resulting in whole or in part from the negligence speci-

> fied in the Act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states."

Speaking directly on the point under consideration here, he said:

> "This court will examine the record and if it is found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death judgment against the carrier will be reversed."

In *St. L.-S. F. R. Co.* v. *Mills,* 271 U. S. 344, in speaking on this same subject, Mr. Justice Stone said, at pages 345, 346:

> "Petitioner argues that the evidence did not warrant the submission of any of these questions to the jury and contends among other objections that there is no evidence of a breach of any duty owing by petitioner to respondent. The question of law thus raised goes directly to the right to recover under the Act upon which the action was based."

II.

There was no concession below by petitioner that McCarthy was an officer, agent or employee of petitioner within the meaning of these words as used in the Act. Neither did the use of such words as "employed," "employer," "employee" or "employment" by the witnesses in referring to the arrangement with McCarthy constitute evidence that McCarthy was such agent, servant or employee.

Respondent contends that petitioner by its instruction No. 4 (R. 206) conceded on the trial that

McCarthy was its employee and contends that the use in the instruction of the words "employed" and "employment" and the use of similar words in the testimony of witnesses referring to the engagement of McCarthy prevents petitioner from contending here that McCarthy was not an employee within the meaning of the Act. This contention is likewise wholly without foundation.

In the first place, this instruction was requested after the trial court had refused to direct a verdict for petitioner on the theory that McCarthy's knowledge and failure to act did not thrust liability on petitioner. The trial court having held that McCarthy's knowledge was *imputed* to petitioner, said court was then under the necessity of submitting the case to the jury on that theory. The court having ruled that there was evidence that McCarthy was an employee in the sense intended by the Act, and having given plaintiff's instruction No. 1 on that theory (R. 202), and petitioner, having excepted to such ruling and the giving of such instruction, it did not concede such ruling to be correct when it requested instruction No. 4. This instruction simply told the jury that even though they might find from the evidence "that defendant's officers and agents employed one McCarthy as an informant * * * and that prior to and at the time of such employment they knew McCarthy was a thief * * * yet such employment by them of McCarthy as such informant was not unlawful; and that defendant is not by reason of such employment liable for the act of McCarthy in accompanying Gladsen and

others in an attempt to rob the train * * * nor for the act of McCarthy in being present at the time and place of the fatal shooting, etc."

In the second place, the use of the words "employ" and "employment" in this instruction did not concede that McCarthy was an employee within the meaning of the Act. Neither did the use of such or similar words by the witnesses in referring to the engagement of McCarthy by the petitioner constitute evidence that McCarthy was an employee within the meaning of the Act. The use of the words "employ" and "employment" was proper in referring to the engagement of an independent contractor for both in common parlance and in legal nomenclature one is "employed" to perform an independent contract. An independent contractor is *employed* to render a particular service which he contracts to perform. He is employed or hired just as much as is a servant. In practically every text book defining an independent contractor the law writers use the verb "employ" in referring to his engagement or use the word "employer" when referring to the person engaging him for the particular service.

In 2 Thompson on Negligence, Sec. 22, p. 899, an independent contractor is defined as:

> "One who renders service in the course of an occupation representing the will of his *employer* as to the result of his work and not as to the means by which it is accomplished."

This definition of an independent contractor was adopted by the Supreme Court of Missouri in *Fink* v.

Furnace Co., 82 Mo. 276. It has been quoted with approval in practically every decision of that court dealing with similar questions up to the present time. One of the late decisions of that court is *Thomassen* v. *West St. L. Water & Light Co.*, 312 Mo. 150, where, at page 153, the definition by Judge Thompson is quoted with approval. On page 154, the author of the opinion quotes with approval the definition given by Sherman & Redfield on Negligence, wherein they refer to the one engaging the service of an independent contractor as the "employer." On page 155, it quotes with approval from Judge Cooley, in his work on Torts (2nd Ed.) top page 647, where he uses the verb "employ" with reference to the engagement of the independent contractor. Likewise, the opinion quotes from Wharton on Negligence, Section 181, an excerpt from *Painter* v. *Mayor of Pittsburgh*, 46 Pa. State 313, where Judge Sharswood said:

> "It may be considered as now settled that if a person *employs* others not as servants but as mechanics or contractors in an independent business * * * he incurs no liability for injuries resulting to others from their negligence or want of skill."

In *Lawhon* v. *St. Jos. Vet. Lab.*, 252 S. W. 44, 48, the Supreme Court of Missouri *en banc*, speaking through Judge Ragland, said, at page 48:

> "It is frequently difficult to determine whether an *employee* is a servant or an independent contractor, etc."

In 14 Ruling Case Law, p. 67, Sec. 3, the words "employed" and "employer" are used by the author in referring to an independent contractor thus:

> "The vital test in determining whether a person *employed* to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the *employer.*"

On page 38 of petitioner's Revised Brief will be seen a quotation from 2 Corpus Juris, Sec. 10, page 424, where the distinction between an agent and servant on the one hand, and an independent contractor on the other, is drawn. In this quotation the words "employer," "employed" and "employment" and even the word "employee" are used in connection with the engaging of the services of an independent contractor.

In 4 Words & Phrases (3rd Series) under the title "Independent Contractor, pages 222 to 235 inclusive, will be found many definitions of "independent contractor" aside from the statutory definitions in Workmen's Compensation Acts. In the bulk of these definitions as used by the various courts, it will be found that the courts make free use of the verb "employ" as referring to the engagement of an independent contractor and likewise use the word "employer" in referring to the person engaging his services. The same is true of the definitions under the title of "Independent Contractor" in the first and second series of Words & Phrases.

This court has made similar use of such terms. In *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, the

court quoted with approval the words of Holmes, C. J. (later Mr. Justice Holmes), in *Driscoll* v. *Towle,* 181 Mass. 416, as follows:

> "Of course, in such cases the party who *employs the contractor* * * *. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make *the employer* liable under the fiction that the act of the *employee* is his act."

Similarly, in *Casement* v. *Brown,* 148 U. S. 615, this court, speaking through Mr. Justice Brewer said:

> "* * * They (Casement & Co.) did not agree to enter generally into the service of the companies and do whatsoever *their employers* called upon them to do but they contracted for only a specific work."

Hence, it is plain that the use by Mitchell, Boult and Barber in their testimony of such words as "employed" etc., does not constitute evidence that McCarthy was an employee within the meaning of the Act—when the *facts* as to what the engagement actually was clearly disclosed, at most, an independent contractor relation, and when Mitchell had expressly testified that he had not employed McCarthy "as a member of the department" (R. 15).

III.

David Did Not Know of Petitioner's Engagement With McCarthy.

On pages 21, 22 and 23 of Respondent's Revised Brief, it is asserted that the evidence justified a find-

ing that David knew of petitioner's engagement with McCarthy and "had a right to rely upon this method of giving advance information."

The only evidence on this subject was directly to the contrary, it being contained in the testimony of Chief Special Agent Mitchell (R. 11-33), Assistant Chief Special Agent Boult (R. 33-60), and Special Agent Barber, in charge of petitioner's Kansas City office and men (R. 192-201). The arrangements with McCarthy were made secretly by Mitchell and Boult (R. 17, 18). Barber, who employed David (R. 193, 194) testified (R. 199):

> "Q. State whether or not you advised the other special agents and train riders of the employment of Harry McCarthy?
>
> A. I didn't.
>
> Mr. Freet: We object to that unless it is shown it came to the knowledge of the deceased.
>
> The Court: He said he didn't.
>
> Q. You didn't advise anybody of the employment of Harry McCarthy?
>
> A. No, sir.
>
> Q. State the reason of that? Was it kept a secret or not?
>
> A. It wasn't calculated, on such cases—it wasn't calculated to come to the knowledge of anyone employed.
>
> Q. Outside of the head men?
>
> A. Outside of the heads who employed them."

Respondent's attempt (Resp. Rev. Br. 21), to establish that David knew of McCarthy's engagement (while wholly immaterial—see authorities our Revised Brief) because of the fact that McCarthy had on a

prior occasion advised Boult on 15th Street (R. 44), of the gang's intention to that night rob petitioner's train at Kenneth Tank, Kansas, and because Boult promptly sent armed men to Kenneth Tank, is unjustified. There was no evidence whatsoever that Boult imparted to David, or anyone else, the source of his information that a robbery at Kenneth Tank was contemplated that night. The implication from Mr. Boult's testimony (R. 45) is clear that he did not inform any of the train riders as to McCarthy's "tip" of the robbery—which in fact was not attempted (R. 46).

Respondent's contention that the foregoing facts prove that David had a right to and did rely upon and believe that he would receive advance information of any robbery attempted by this gang is so strained and unwarranted that further comment seems plainly unnecessary.

It is respectfully submitted that the judgment below should be reversed.

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